

SECTION-BY-SECTION ANALYSIS**"ELECTRIC POWER COMPETITION AND CONSUMER CHOICE ACT OF 1997"****INTRODUCED BY REPRESENTATIVE EDWARD J. MARKEY (D-MA)****THURSDAY, JUNE 19, 1997****SECTION 1--SHORT TITLE**

The Act is entitled the "Electric Power Competition and Consumer Choice Act of 1997" (referred to herein as "the Act").

SECTION 2--FINDINGS

This section contains a series of six Congressional findings that equitable rates for electric consumers and increased efficiency in the use of technology and resources for the generation of electric power require: 1) increased reliance on competition and market forces; 2) access to transmission and distribution facilities for all suppliers and marketers of electricity; 3) a program to promote fuel diversity, conservation, and environmental protection through encouragement of renewables; 4) state action to assure that utilities may only seek to recover those legitimate, verifiable, and nonmitigatable stranded costs for which there was a reasonable expectation of recovery; 5) appropriate federal and state regulations to promote competition and protect consumers from excessive charges; and 6) reform of federal and state regulations to prevent excessive concentrations of market power.

TITLE I--STANDARDS OF COMPETITION*Subtitle A -- Application of PUHCA and PURPA***SECTION 101 -- PUHCA NOT APPLICABLE IN COMPETITIVE MARKETS**

This Section amends the Public Utility Holding Company Act of 1935 ("PUHCA") to provide that PUHCA shall not apply to a holding company system (including any company in the system or affiliate of such company) if each such company and affiliate that is an electric utility has received a certification of compliance with the standards and requirements of the new subtitle F of Title I of the Public Utility Regulatory Policies Act of 1978 ("PURPA") from all State regulatory authorities which have ratemaking authority over the electric utility.

SECTION 102 -- PURPA NOT APPLICABLE IN COMPETITIVE MARKETS

This Section amends Title II of PURPA by adding a new Section 214 to PURPA which provides that the mandatory power purchase provisions set forth in Section 210 of that Act (which require electric utilities to offer to purchase power from independent power producers at their avoided cost) shall not apply during any period for which a certification of competition from a State regulatory authority in accordance with new subtitle F of Title I of PURPA is in effect. The Section also contains a provision stipulating that existing PURPA contracts shall not be abrogated by the provision.

The Section adds a new Subtitle F to PURPA regarding standards of Competition for Electric Utilities. The Subtitle amends Section 11(d) of PURPA to require each state regulatory authority to undertake a proceeding to meet the federal retail competition and public benefit requirements established under the Subtitle. Under new Section 151 of the Subtitle, a state regulatory authority may elect to make a voluntary state certification that it has decided to require persons selling or distributing electric energy to comply with the standards and requirements of competition set forth under the subtitle. State regulatory authorities which make such certifications must determine that the person selling or distributing electric energy has met the federal retail competition standards and public benefit requirements established under the Act, as well as such other requirements as the Federal Energy Regulatory Commission ("FERC") prescribes by rule. Certifications shall be withdrawn if it is determined that the person has ceased to meet the standards. States which -- after completing their proceeding -- elect not to move to competition are free to do so. However, utilities operating in those states remain subject to PUHCA and to Section 210 of PURPA.

RETAIL COMPETITION AND PUBLIC BENEFIT STANDARDS. -- New Section 152 of the Subtitle sets forth the federal standards and requirements of competition which the states must certify compliance with in order for utilities in the state to qualify for relief from PUHCA and PURPA. There are two standards established under the Section.

Retail Competition Standard: A person selling or distributing electricity meets the federal competition standard if there are: 1) unbundled competitive sales of retail electric energy services; 2) competition for new generating capacity; 3) absence of competitive advantage by virtue of ownership or control of distribution or transmission systems; 4) open access tariffs for distribution; and 5) reasonable and nondiscriminatory access to local distribution facilities.

Public Benefit Standard: A person selling or distributing electric energy meets the public benefit standard if there are: 1) both incentives and opportunities for all suppliers of energy services to electric consumers to provide energy efficiency and renewable energy resources; 2) nonbypassable charges on use of or access to electric energy services or facilities adequate to ensure funding for costs associated with low-income services, renewables, energy efficiency, and labor transition costs; 3) protections in place to assure that consumers are protected against price discrimination or undue price increases and to ensure that retail electricity consumers are not saddled with an unfair share of any "stranded cost" recovery approved by the state; 4) protections in place to assure that consumers and the environment are protected from state-imposed stranded cost recovery decisions which link ratepayer recovery to continued operation of the asset for which recovery is sought; 5) protections in place to assure that all persons seeking to provide retail electric service have met minimum safety and reliability requirements; 6) protections aimed at assuring that there are reasonable opportunities to consumers to aggregate electric energy purchases in order to lower costs; and 7) allowance for net metering of electricity to promote distributed energy generation and increased reliance on renewables.

RECIPROCITY REQUIREMENT. -- New Section 153 provides that it shall be unlawful for any person, state or local government agency, power marketing authority, or the TVA to provide retail electric service to any person not within its designated service territory under State or federal law if such service is not available on a competitive basis to all retail energy customers within such service territory. The Section further provides authority for civil actions to be brought to enforce compliance with the reciprocity requirement.

New Section 154 provides a definition of the term "renewable energy".

SECTION 103 -- ADDITIONAL RULES APPLICABLE TO ELECTRIC UTILITIES AND HOLDING COMPANIES

This Section makes several amendments to federal energy laws, as follows:

PREVENTION OF COMPETITIVE ADVANTAGE. -- This provision creates a new Section 215 of the Federal Power Act ("FPA"), which requires the President or his designee to adopt rules within 12 months of the date of enactment which assure that persons generating or providing electric energy for sale or for ultimate consumption cannot obtain any competitive advantage by virtue of their ownership or control of generating facilities which are not subject to EPA's performance standards for new facilities. Such rules shall establish market-based generation performance which the EPA certifies as sufficient to assure that regional or national emissions of air pollutants are brought to levels sufficient to protect human health and the environment.

STATE AND FEDERAL RATEMAKING AND OTHER REGULATORY AUTHORITIES. --

This section makes several reforms affecting federal and state jurisdictional and other matters.

Two provisions overturn recent judicial decisions which: 1) limited State authority to review prudence of FERC-approved costs (the so-called "Mississippi Decision") and, 2) the FERC's authority to disallow the inclusion of contract or transaction costs incurred by PUHCA-regulated utilities where the Securities and Exchange Commission ("SEC") has previously approved the contract or transaction (the so-called "Ohio Power" decision).

Other provisions clarify state authority to impose nonbypassable charges to fund certain public benefit programs and FERC authority to establish power safety and quality standards with respect to net metering of electricity.

Finally, two other provisions overturn two controversial recent actions by the SEC which are inconsistent with the Congressional intent underlying PUHCA: 1) the SEC's decision to allow registered utility holding companies to invest up to 100% of their consolidated retained earnings in foreign utility companies (as opposed to the 50% threshold previously in existence); and 2) the SEC's adoption of Rule 58, which allows registereds to greatly expand investment in energy service companies without having to comply with PUHCA's functional relationship test and other applicable PUHCA requirements.

Subtitle B -- Mergers, Acquisition, Market Concentration, Affiliate relationships and Diversification

SECTION 111 -- MERGERS AND ACQUISITIONS

This Section prohibits any person from acquiring an interest in a public utility company (either an electric or gas utility) that results in ownership of a substantial interest and effective control of such a

company unless the person makes certain certifications to the FERC and the FERC approves the merger or acquisition.

Under the Section, any person seeking approval of a proposed merger or acquisition must certify to the FERC that: 1) if the merger involves an acquisition premium the acquirer will not seek to recover such premium from rate regulated services to the extent such premium exceeds amounts which the FERC has determined to be just and reasonable; 2) each state commission with jurisdiction over the public utility company has certified it has the authority and resources to prevent the acquisition from having an adverse effect on retail rates. FERC may approve the merger or acquisition if it finds that: 1) the acquisition will not create or maintain a situation inconsistent with effective competition in any market in which competition would benefit consumers; 2) the acquisition will result in substantial cost reductions in the provision of electric energy or natural gas that are greater than could be achieved without the acquisition; and 3) the acquisition will be entered into on an arm's-length basis.

In addition, the Section grants FERC authority to establish terms and conditions applicable to utility mergers and acquisitions necessary to ensure the continuing validity of all the findings and certifications required under the Section. Finally, the Section provides definitions of the terms "acquire" and "substantial interest in a public utility," and makes conforming changes to Section 203(b) of the FPA.

SECTION 112 -- MARKET CONCENTRATION AND AFFILIATE RELATIONSHIPS

This Section provides that a public utility company or its affiliate may not use its ownership or control of any resource to create or maintain a situation inconsistent with effective competition in the purchase of electricity or natural gas in any market in which such company has a designated service territory for the retail distribution of electric energy or natural gas. Whenever FERC finds a violation of this general prohibition, it may order a public utility or affiliate to: 1) sell or transfer assets to a non-affiliated company on an arm's-length basis; 2) sell or transfer assets to an affiliated company on an arm's-length basis; 3) conduct business activities involving the resources concerned on an arm's-length basis; or 4) share access to assets on a nondiscriminatory basis at rates which are just and reasonable and not unduly discriminatory or preferential.

SECTION 113 -- DIVERSIFICATION

This Section directs FERC to establish regulations which ensure that public utility company diversifications: 1) have no adverse impact on electric or natural gas customers of such company; 2) are subject to an arm's-length relationship between transmission and distribution service activities, retail sales activities and any other business activities of the company or its affiliates; 3) are subject to requirements that FERC and the States have access to books and records. Under the Section, FERC is directed to deny any diversification unless each State commission with ratemaking authority over the company has certified that it has the authority and resources to prevent the diversification from having an adverse effect on retail customers of the public utility.

The Section also makes certain changes in law with respect to affiliate company relationships. First, it invalidates any contract between a public utility and an affiliate with a total value of \$1 million or more unless the State utility commission with authority over the utility has found that such contract will have no adverse effect on consumers and such State Commission has both the authority and resources to

prevent any such adverse effect. Second, the Section clarifies FERC and State authorities to disallow any costs unreasonably incurred, or imputing any revenues unreasonably forgone, as the result of an interaffiliate transaction. Third, the Section amends the "conflicts" provision of the FPA to delete existing provisions of law which provide for SEC rules to take precedence over FERC rules in the event of a conflict between such rules.

SECTION 114 -- ENFORCEMENT

This Section provides for the enforcement provisions of the FPA to apply to enforcement of Subtitle B of this Act.

SECTION 115 -- ANTITRUST LAWS NOT AFFECTED

This Section is a savings clause the provides that Nothing in the Act shall be construed to modify or supersede the application of antitrust laws.

Subtitle C -- Electric Energy Transmission and Distribution Policies

Section 121 -- Transmission Access and Facilitation of Retail Competition

This Section amends Section 211 of the FPA by adding a new paragraph f) relating to transmission access. New paragraph (f) requires the FERC to issue rules within 12 months of the date of enactment to establish tariffs applicable in the largest region or regions feasible to: 1) ensure development and efficient operation of competitive electricity markets, while encouraging economical and efficient use of existing and future generation facilities; 2) ensure full recovery by owners transmission facilities of all prudent transmission costs; 3) prevent multiple charges for transmission service based on the number of transmission owners; 4) prevent any person engaged in the sale of energy from gaining a competitive advantage by virtue of its ownership or control of transmission or distribution facilities. The Section also clarifies that any order under the FPA requiring a transmitting utility to provide wholesale transmission service shall also apply to retail transmission service to the extent necessary to permit the provision of retail competition.

Section 122 -- Application of FERC Open Access Rules to Nonjurisdictional Utilities

This Section would assure that rules such as FERC's Rule 888 on wholesale electricity transmission or any rules subsequently adopted by FERC to facilitate retail transmission shall apply equally to any transmitting utility that is not a public utility and to any federal power marketing agency. The Section also gives FERC exemptive authority which could be used to exempt such entities from such rules if FERC finds such an exemption to be in the public interest.

Section 123 -- Access to Books and Records

This Section amends Sections 201(g)(1) and 301 of the Federal Power Act to ensure that public utilities and their affiliates produce for examination such personnel, books, records, memoranda, contracts, records or other materials which FERC or a State Commission orders in connection with the discharge of its responsibilities. The Section further provides that the cost of any audit ordered by FERC or a State Commission under this Section or under State law shall be borne by the public utility and its affiliates.

Section 124 -- Additional Amendments to PURPA

This Section overturns FERC's so-called "BPRU Decision," which invalidated a State of California plan to encourage renewables energy generation. The Section provides that nothing in this Act, the FPA, or any other provision of federal law prevents a state regulatory authority -- for purposes of calculating avoided costs -- from setting such costs at levels which reflect avoided environmental costs that are not included in market rates. In addition, the Section clarifies that States may segment bidding for providing such energy by generation technology or groups of technologies. This provision would only affect those States which have not made the certification of competition under this Act, and have retained a rate-regulated monopoly structure for electric utilities in the State.

Section 125 -- Consumer Information

This Section amends the Fair Packaging and Labeling Act ("FPLA") by adding a new Section 13 and Section 14 to that Act.

New Section 13 requires the Federal Trade Commission ("FTC"), in consultation with the EPA and the Department of Energy ("DOE") to issue rules, not later than January 1, 1999, which prescribe the form, content, and frequency of electricity supplier consumer disclosure. These rules are aimed at assisting electric consumers in making informed purchasing decisions. Under the FTC rules, each person who sells or offers to sell electric energy to consumers in a State which has moved to retail competition (under the standards adopted under the Act) shall provide to the electric consumer the historic and projected generating source data, air and water emissions data, price and billing information, a description of any other charges, reliability data, and environmental and nuclear safety compliance information. The Section also provides that in every contract for sale of electric energy for resale, the seller shall provide the purchaser with such generation source and emissions data as may be required under FTC rules.

Under the Section, the FTC is granted authority to obtain books and records needed to carry out its authorities, to exempt from disclosure information which it determines it is not technologically or economically feasible to provide or is not likely to assist consumers in making purchasing decisions, and to define certain terms used in the Section.

The Section also provides for enforcement by making it unlawful for any person to fail to provide any of the information required by the Section, or to provide false or misleading information. Both the FTC and the States are granted authorities to enforce compliance with the Section.

New Section 14 of FPLA provides new legal protections for electricity consumer proprietary information. The Section requires that any person who receives or obtains customer information by virtue of its provision of a retail electric service shall only use, disclose, or permit access to individually identifiable consumer information in its provision of retail electric service or billing and metering service unless such person has obtained the prior written approval of the consumer for other use of such information. The Section further provides that an electric utility or metering and billing service provider shall disclose consumer information upon the affirmative written request by the consumer to any person designated by the consumer. In addition, the Section allows persons that receive or obtain consumer

information by virtue of their provision of retail electric service to use, disclose, or permit access to aggregate consumer information under certain circumstances. Finally, the Section clarifies that nothing in the section is intended to prohibit an electric utility or billing and metering service provider from using, disclosing, or permitting access to consumer information needed to initiate, render, bill and collect for retail electric services or billing and metering services, to protect the rights or property of the provider, to protect consumers of those services from fraud, or to comply with any federal or State law authorizing disclosure of information to a Federal or State agency.

Section 126 -- Federal Renewables Policy

This Section requires each person who generates and sells to any other person electric energy to submit to DOE renewable energy credits (computer in kilowatt hours) in an amount equal to a specified percentage of its total of such sales in the preceding calendar year. The specified percentage shall be 3 percent for the calendar year 1998 and shall increase to 10 percent by the year 2010. Persons generating electric energy can comply with the renewables requirement either by submitting credits for renewables generation they own or by purchasing credits from other persons. DOE is directed to establish rules creating the renewable energy credit program, and its directed to impose and collect fees in an amount equal to the administrative costs of the program. DOE is also authorized to issue rules to provide for the issuance, recording, monitoring of the sale or exchange, and tracking of such credits and ensuring public disclosure of price information regarding such credits. DOE is also granted authority to bring actions to impose civil penalties for noncompliance with the Section, and to promulgate other rules needed to carry out the purposes of the Section.

Section 127 -- Universal Service

This Section requires the FERC to establish a federal-State Joint Board on Universal Service to recommend changes in universal support mechanisms in those States that move to retail competition. The Section sets forth several general principals upon which the Joint Board and the States should base policies for the preservation and advancement of universal service, including: 1) availability of quality services at just, reasonable and affordable rates, 2) assurance of access to any advanced services; 3) assurance of access in rural and high cost areas to all electric service; 4) all providers of electric services should make equitable and nondiscriminatory contributions to universal service; and, 5) specific and predictable mechanisms should be established to preserve and advance universal service. In making the public benefit certification regarding sustained and equitable allocation of costs associated with low-income services, States shall consider the recommendations of the Joint Board.

Subtitle D -- General and Miscellaneous Provisions

This Subtitle defines various terms used in the Act, including "public utility", "affiliate", "arm's length relationship", "diversification", "economic risk", "effective competition", "public utility company", and "renewable energy".

TITLE II -- RELIABILITY

Section 201 -- Electric Reliability Councils

This Section amends Part II of the FPA by adding a new Section 217, which provides for the

establishment of FERC oversight of self-regulated electric reliability councils such as the North American Electric Reliability Council ("NERC"). The section provides that such councils shall serve as self-regulated organizations whose membership consists of electric utilities and transmitting utilities and whose mission is to promote the reliability of the electricity supply and system. Each electric utility and transmitting utility would be required to join an electric reliability council. The councils are authorized to condition membership on meeting certain standards of operation, and to establish rules that permit open access to membership, assure fair representation of its members, allocate equitably dues, fees, and other charges, set standards of utility operation designed to foster reliability, and provide procedures for disciplining, fining or suspending members for violations of its rules. The Section empowers FERC to oversee the operations of the councils, review and approve the council's rules or policy changes prior to their adoption, and amend such rules if it determined such action were necessary to promote the objectives set forth in the Section. The Section also empowers the FERC to review disciplinary actions undertaken by the councils, and affirm, set aside, or modify such actions. Finally, the Section authorizes FERC to suspend or revoke the registration of an electric reliability council or a member of a council or limit the council's activities or functions if it determines such action is needed to protect the electric reliability system.